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South Carolina House of Representatives

Legislative Update & Research Reports

Robert J. Sheheen, Speaker of the House

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Legislative Update

Prefiled Bills

The last of the prefiled bill summaries are presented in this week's *Update*. Now that the House has gone into its 1987 session, bills are being read across the desk and assigned to committee, and in the next issue we'll begin presenting summaries of the more notable filed legislation.

Aging

Firefighters and law enforcement officers (H.2078, Rep. Pat Harris). Provides that it is not unlawful for a government to refuse to hire or to discharge a person because of age if the action is taken regarding firefighters or law enforcement officers, and the person has reached the age of retirement in effect on March 3, 1983.

Other changes made to section 1-13-80 of the Human Affairs Law make the following adjustments:

1) No seniority system or benefit plan may require involuntary retirement because of age. However, where employees were covered by a collective bargaining agreement in effect on June 30, 1986 (changed from September 1, 1977) which violates this item, this item will go into effect upon termination of the agreement or January 1, 1990 (changed from January 1, 1980), whichever comes first.

2) Compulsory retirement is allowed because of age for individuals employed in executive positions for two years before retirement and entitled to a minimum immediate nonforfeitable annual retirement benefit. The age referred to in the section is changed from 65 but not 70 years of age to 65. The aggregate minimum amount of retirement benefit is increased from $27,000 to $44,000.

3) Compulsory retirement for an employee of 65 but not 70 years of age having a contract of unlimited tenure at an institution of higher education; now repealed on July 1, 1982, the bill would change this to age 70 and the repeal date to December 3, 1993.

Children and Families

Divorce (H.2087, H.2088, Rep. P. Bradley). These measures would amend the State Constitution to reduce the period of "continuous separation" which qualifies as a cause for divorce in South Carolina. The time period is now one year; this legislation would reduce that to six months. H.2087 proposes the amendment to be voted on by electors; H.2088 writes the changes into the *Code*.

Education

Contraceptives in schools (H.2095, Rep. Fair). See under Health.

Environment

Freshwater wetlands protection (H.2084, Rep. Foxworth). This legislation proposes a comprehensive package to protect the freshwater wetlands in the state by providing uniform management and state-wide, minimum standards. The program would be operated by the Department of Wildlife and Marine Resources.

Freshwater wetlands are those areas which are underwater all the time, or for a large part of the year. The bill defines them more scientifically as "lands ... transitional between terrestrial and aquatic systems where the water table is usually at or near the surface or the land is covered by shallow water." Wetlands are important for a number of reasons, including flood, storm and erosion control, habitat for wildlife, groundwater supply, recreation, research, open spaces along river fronts and lake shores, and as part of the food chain.

The bill would authorize the Wildlife Department to consider applications from persons who want to undertake "regulated activity" on wetlands. Such activities would be those which might alter wetlands by excavations, dredging, drainage, destruction to plant life, driving pilings or putting up structures, dumping or filling, or creating obstructions.

An application requesting a permit to engage in any regulated activity would have to include the following: a report showing that the activity would not unreasonably cause damage to the wetlands—such as interfere with recreation or navigation, harm the wildlife or its habitat, lower water quality, and so forth. Unless any adverse impact on the wetlands is acceptable, the Department would not issue a permit.

The bill also allows local governments to enact stricter protective laws for wetlands, and instructs the Department to conduct an inventory of the state's existing wetland areas.

Fiscal

Fuel sales (H.2057, Rep. McAbee). This bill would amend the part of the *Code* relating to unfair trade practices. It would make it unlawful for any person engaged in the sale of octane or cetane fuel to do any of the following:

1) Sell any grade of product below cost or discriminate in price between purchasers.

2) Give or accept compensation or discount except for services rendered in connection with the sale or purchase of the product.

3) Pay compensation to a customer of a person involved with the processing, handling or sale of the product refined, or sold, unless this compensation is available to all other customers competing in the distribution of the product.

4) Discriminate in favor of one purchaser by furnishing any services or facilities connected with the processing, handling or sale of the product.

5) Knowingly induce or receive a below-cost or discriminatory price prohibited by the article.

The bill also would require that outlet owners with an average monthly volume of over 10,000 gallons must keep a record of the price of each grade and the times and days the prices were in effect. This record would have to be kept for two years.

Government Operations

Page attire (H.2090, Rep. Moffatt Burriss; H.2092, Rep. Russell; H.2098, Rep. Corning). During its organizational session the House amended rule 10.5, to define "dignified dress" for female pages and guests of the house as dresses or skirts and blouses. There followed considerable attention to this change: letters to the editors of newspapers, editorial cartoons, and news stories on radio and television.

These three measures would amend Rule 10.5 once more, and all three bills would allow female pages and guests to wear pants suits or slacks in the Chambers.

It is interesting to note the variants possible in drafting legislation—even bills which contain the same meaning. The three bills here are identical in wording, except for the passages which deal with the attire of female pages and guests.

Be it resolved by the House of Representatives:

That the second paragraph of House Rule 10.5 is amended to read:

"Pages and guests of the House shall observe appropriate attire which means shirt and tie (with coats optional) for males ...

... and dignified dress (meaning dress, skirt or slacks and blouse, or pants suits) for females. (H.2090)

... and dignified dress (meaning dress, skirt and blouse, pants and blouse, or pants suit) for females. (H.2092)

... and dignified dress for females. (H.2098).

Bingo for recreation (H.2085, Rep. J. Rogers). This bill proposes increasing certain fees for bingo games, and using the additional revenue for parks and recreational facilities in South Carolina counties.

Groups holding Class E bingo licenses (volunteer groups) would remain unaffected, but those persons holding Class A or Class B license would be affected. Class A license holders would be required to increase their admissions tax from $3 to $9 per session, while Class B games would have their admissions tax raised from $1 to $2 per session.

Half of the annual revenue raised would go into the state General Fund. The other half would go into a special fund created for the Department of Parks, Recreation and Tourism. It is this PRT fund which would be used to enhance recreational facilities, through a system of grants.

The money would be distributed as follows:

1) Each county would get an allocation of $20,000.
2) 75% of the remainder would be distributed to counties on the basis of population. (Distribution within the county would also be on the basis of population.)
3) The rest of the money would be awarded to "eligible entities" within counties by a grant program. PRT would establish the criteria and guidelines for the grants.
4) Up to 5% could be used by PRT for administering the program.

"Eligible entities" are local governments which have provided parks or recreational services for at least twelve months. Special purpose districts are included. Grant awards would be on a reimbursement basis, and the local matching share would be 20% of the total.

Health

No Contra Aid (H.2095, Rep. Fair). Actually this bill is not dealing with the Contras in Nicaragua, but contraceptives in South Carolina. The measure would prohibit state-supported colleges and universities, and public schools, from dispensing contraceptive devices or medications.

Patient Care Advisory Committee (H.2094, Rep. Keyserling). This bill would require all hospitals in the state to set up patient care advisory committees to help patients, their families or guardians to make those difficult decisions which have become increasingly associated with modern medical care. In the treatment of many life-threatening conditions medical science has options which are bewildering and confusing to many of us--especially during times of emotional stress. The advisory committee would be a method of assisting persons during those times.

The committee would consist of a physician not directly involved with the care of the individual patient; a registered nurse also not involved; a social worker; the chief executive officer of the hospital or a designee; and others as appropriate, such as community representatives, ethical advisors, or members of the clergy. The purpose of the committee: educate, recommend, advise.

Highways, Byways, Airways and Safety

Seat belts save lives (and reduce traffic tickets) (H.2091, Rep. Russell). This measure would allow a reduction of 25% in the fines for minor traffic violations if the person who committed them was wearing a seat belt at the time. Traffic tickets would be changed over to include an appropriate notice to that effect.

DUI (H.2086, Rep. P. Bradley). Under provisions of this bill, a person would be declared "under the influence" with less alcohol content in his or her blood. The bill reduces the percentage by weight of alcohol in a driver's blood to determine DUI status.

At present, a person with .05% or less by weight of alcohol in the blood is not under the influence; this would not change.

At present, a person having between .05% and .10% is perhaps under the influence, perhaps not. The content is not enough to be conclusive, but it is something that must be considered with other evidence in determining the guilt or innocence of the person. This would change under H.2086. The new level would be reduced to .08% at the upper level.

Anyone found with more than .08% alcohol in their blood would be considered under the influence; the current amount required is in excess of .10%.

Labor, Commerce and Industry

Joint underwriting association (H.2016, Rep. John Bradley). This would create a joint underwriting association to provide professional liability insurance for professionals licensed and regulated by the state. The association would be activated if the Chief Insurance Commissioner declared an emergency because of the unavailability of such insurance on a normal basis through reasonable channels. Once the association was set up, any professional licensed in the state would be entitled to apply for coverage.

Members of the association would be all insurers authorized to write bodily injury liability insurance (other than automobile, homeowners and farmowners liability insurance) in South Carolina. Every such insurer would automatically be a member of the association, and would have to remain a member of the association as a condition of continuing to write such insurance in South Carolina.

Liability insurance for attorneys (H.2019, Rep. John Bradley). This measure would create a joint underwriting association to provide legal professional liability insurance for attorneys.

The association would be activated if the Chief Insurance Commissioner declared there was an emergency, because liability insurance was unavailable to attorneys on a normal basis through reasonable channels. Once the association was activated, any attorney licensed in South Carolina could apply for coverage.

As with the joint underwriting association for professionals proposed in H.2016, all authorized insurers (other than auto liability, homeowners and farmowners liability) would automatically be members of the association.

Health Insurance Pool (H.2027, Rep. John Bradley). This measure would create the South Carolina Health Insurance Pool to include all insurers authorized to issue or provide health insurance, and insurance arrangements providing health plan benefits.

Pool members would select a seven-member Board of Directors whose duties include submitting a plan of operation to the Insurance Commission for approval. The plan would include procedures for handling and accounting of assets and monies in the pool; selection of an administering insurer; and procedures for the collection of assessments from members and the level of payment.

Any person who is a resident of South Carolina for six months and his newborn child would be eligible for pool coverage if he or she provides evidence of an insurer's refusal to issue health insurance within the last six months for one of the following reasons or with conditions: 1) because of health; 2) except with a reduction or exclusion of coverage for a pre-existing health

condition for a period exceeding 12 months; except at a rate for comparable insurance exceeding the pool's rate.

Reorganization of insurance law (H.2028, Rep. John Bradley). H.2028 comes out of work by the Insurance Law Study Committee and primarily reorganizes current insurance law, deleting out-dated provisions and correcting conflicting provisions, including the following:

1) Changes the duties and powers of the Insurance Commissioner/Commission/Department to correspond with changes outlined by the General Assembly in 1980 but not changed through all statutes.

2) Codifies language found in Act 694 of 1976 which defined the term "small commercial risks" and extended the mandate to write automobile insurance to small commercial risks as well as individuals;

3) Changes numerous statutes in the Insurance Code to give thirty days' notice of an opportunity for a hearing in contests cases. Currently, only ten days' notice is required.

4) Codifies Act 306 of 1975 which extended indefinitely the existence of the SC Medical Malpractice Liability Insurance Joint Underwriting Association, subject to termination by the General Assembly.

5) Moves from Title 23 sections of Title 38 that relate to numerous duties of the Insurance Commissioner that were transferred to the State Fire Marshall way back in 1966.

[*Note: Many thanks to the staff of the House Labor, Commerce and Industry Committee, which gave much help in providing summaries of these various insurance bills.*]

Law and Justice

Police Officers' Bill of Rights (H.2063, Rep. Aydlette). This legislation would define certain rights of police officers, and would establish procedures by which officers can be investigated for alleged infractions.

Specifically the bill affirms the rights of off-duty police officers to engage in political activity, and to keep their finances private, except in the case of a conflict-of-interest investigation or situations where disclosure is required by state or federal law.

Should an officer be subject to interrogation, it would have to be conducted "at a reasonable hour," and in the offices of those conducting the investigation (or "other reasonable place"). Before

a complaint could be investigated, the person making the charges would have to be sworn in, and the police officer under investigation would have to receive a written notice of the specific allegations. Officers would have the right to be represented by counsel.

The officer could not be subjected to offensive language, or threats of transfer, dismissal or disciplinary action. The proceedings would have to be recorded in full--except if the officer being questioned asked to speak off the record.

For "good cause" the police department could require tests for alcohol and/or drugs, and also polygraph examinations. The refusal to take such a test, or their results, could be used in disciplinary actions but not in criminal proceedings against the officer.

The use of polygraph examinations ("lie-detectors") is not without controversy. Some say the instruments are very reliable; others claim they are extremely erratic. The proposed bill allows the use of polygraphs, but prohibits relying on them exclusively: "The polygraph examination may be used as an investigative tool and the results are not to be accepted or considered as positively being the truth."

The bill requires police departments with more than twenty officers to set up Complaint Review Boards which can hear the cases of officers charged by investigations by the internal affairs division of a department. Jurisdiction would be limited to complaints by citizens or by fellow officers; incidents involving a superior officer citing an officer for violation of department rules or regulations are not covered.

Finally, the bill affirms that police officers cannot have their right to bring suit for damages suffered during performance of his or her duties, or for abridgment of civil rights "arising out of the officer's performance of official duties."

Punishment for murder (H.2081, Rep. Corning). This measure proposes a change in the way in which the sentence for convicted murderers is imposed in South Carolina.

Currently our state has a two-part, or "bifurcated" system for murder cases. A person is first tried to determine guilt or innocence, and then for those found guilty, a second trial is held to determine sentencing. During this second trial the jury must consider the circumstances surrounding the crime, both those which would might tend to lessen the sentence (the mitigating circumstances) and those which would incline towards a more severe sentence (the aggravating circumstances). It is then up to the jury to decide on either life imprisonment or the death penalty.

This bill proposes changing the second trial to make the jury's verdict an advisory one only. The circumstances would still be presented and the jury would still consider them, but its recommendation for sentencing would not be binding; it would be up to the judge to make the final sentencing.

Finally, the bill also would extend the time a person serving a life sentence would need to be eligible for parole, extending the present twenty years to thirty years.

Judicial Nominating Committee (H.2082, Rep. Corning). The purpose of this legislation is to create a committee "to assist the General Assembly in the selection of qualified justices and judges."

The Judicial Nominating Committee would consist of 18 members. Six would be lawyers who were not members of the General Assembly. These would be picked by the President of the South Carolina Bar, one from each of the Congressional Districts. Six members would be non-laywers and non-members of the General Assembly; these would be selected by the Governor, again, one from each Congressional District. The final six would be elected from the ranks of the General Assembly, three from the House, three from the Senate.

Members of the Committee would serve six-year terms; the first set of terms would be shortened so that the terms would be staggered. Members of the Committee could not themselves be nominated for a judgeship while serving.

It would be the task of the Nominating Committee to screen candidates for judgeships' in South Carolina. It would investigate their backgrounds, their service and their qualifications. It would have subpoena powers. Public hearings would be held, except when a candidate was unopposed.

For each vacant judicial position the Committee would submit up to five names to the General Assembly, except that it can use discretion and send only one name for Chief Justice of the State Supreme Court. For the position of Chief Justice, and all other judgeships whose qualifications are spelled out in the State Constitution, the Committee's recommendations are advisory only. For all other judgeships, however, the General Assembly is bound by the Committee's selections, and must either pick one of the names submitted, or reject them all. In the latter case, the process begins anew.

Limitations on civil actions (tort cases) (H.2077, Rep. Sharpe). This bill would set certain limitations on civil actions regarding tort claims--an issue which is expected to be closely debated during this session of the General Assembly.

This measure proposes many of the changes which supporters of "tort reform" advocate, both in South Carolina and in other states across the nation.

Specifically, the bill would do the following:

1) It reduces the limitation period to bring civil actions from six years to three years;
2) It sets a limit, or cap, on noneconomic damages of $250,000;
3) It requires that punitive damages "bear a reasonable relationship to the actual damages sustained" by a plaintiff;
4) It would have all but 5% of punitive damages paid to the state's general fund; it allows introduction of collateral source payments during the trial;
5) It does away with the doctrine of joint and several liability.

These issues were discussed in last week's *Legislative Update,* and the research report in this edition offers an in-depth examination of these very points. (See page 15.)

Waterfront Erosion: No New Problem

The recent winter storms have caused considerable damage to the coast line of South Carolina, especially in areas around the Grand Strand. The impact of the ocean on our state's coast line is not new, of course, and at least one proposed solution—sea walls—is not new either.

As far back as 1736, the state's General Assembly was considering and acting upon similar events. In the *Laws of the Province of South-Carolina,* compiled by Nicholas Trott, LL.D and printed by Lewis Timothy of Charles-Town there is "An ACT to prevent the Seas further Encroachment upon the Wharff of Charles-Town."

According to the framers of the law, there was cause for alarm:

Whereas the Seas in a few Years last past by frequent Storms hath undermined and broken down more of the Bank bounding upon Cooper-River before Charles-Town, than is now standing, and will probably in a few Years (if timely Care be not taken) break down and carry away all the remaining Wharff, with the Houses next thereon standing therefore, be it enacted ..."

And the solution? *That all persons that hold Lots on the Bay of Charles-Town shall cause a Brick Wall to be built before their Land.*

Wanted in West Virginia: Local Government Finance

Giving local governments (municipal and county) additional finance powers is likely to be an issue during the 1987-88 session of the South Carolina General Assembly. During a recent poll, House members ranked it fairly high in this choice of major issues. Apparently the palmetto state is not the only one where local governments are looking for additional revenue powers.

In West Virginia, a coalition of mayors are going to ask the state legislation to pass laws during its 1987 session to give the state's municipalities the authority to enact their own taxes. At present, the state's towns and cities can put local taxes into place only if they receive specific authorization from the legislature. Now the push is on for "true home rule."

As with South Carolina, the West Virginia municipalities are looking at severe budget problems caused by the loss of federal revenue sharing money. The elimination of these funds will cut into services and programs, according to the mayors. Especially hard hit will be the smaller places, which traditionally have little income of their own, at least under existing tax structures. As examples: Charleston, West Virginia, had only 6% of its budget paid by federal revenue sharing, but for many small towns the federal dollars accounted for as much as 20% to 30% of their total budgets.

Currently, the state's cities with populations over 10,000 use business and occupation taxes as their chief sources of revenue; smaller places rely on service fees and a share of county property taxes.

Charleston's mayor Mike Roark is quoted in *From the State Capitols* as saying that business and occupation taxes are "regressive," but that cities will need legislation authority to move from them to something better. Another mayor wants permission to enact income taxes, city sales taxes, or wage taxes. (All three possibilities were included in local government finance legislation introduced last session in the House.)

The fight for home rule finance powers in West Virginia is not a recent one, according to published reports. Now, however, the loss of federal funds and other budget problems have put the topic at the head of the mayor's agenda. As Mayor "Iron Mike" Roark says, "If [home rule] is ever going to pass, the time is now."

Charleston Preservation Efforts Noted

Charleston, long-noted for its stately mansions and charm, is a a "national symbol of preservation success," according to the feature article in the latest issue of *Historic Preservation,* the magazine of the National Trust for Historic Preservation.

In a piece titled "Charleston's Challenge," author Daniel Cohen and photographer Medford Taylor examine the efforts Charleston has made in preserving its unique heritage.

Three problems: Tourists...

The article notes that historic preservation efforts, laudable as they are, both confront problems and sometimes create them. Three major issues which are now facing Charleston: tourists, development, and dislocation of residents.

Tourists--both an economic benefit and a daily bane--are a hot topic in Charleston, especially as to how much encouragement they need. The new Charleston Place, pushed by Mayor Riley, is a multi-purpose hotel, retail and convention center on King Street, right across from the Market. The center was built after almost a decade of controversy, much of it about the problems more tourists would cause in a city whose streets were made for 18th century traffic, and are more congenial to pedestrians than automobiles.

"There's a breaking point on how many visitors the city can absorb," the article quotes one Charlestonian as saying. While tourism brings economic prosperity (an estimated $1.6 billion annually, says *Historic Preservation*), it does create woes: especially traffic and congestion. Perhaps not the worst effect (but bad enough) of all the tourists: "Traffic tie-ups are particularly galling to old-line Charlestonians who carry on the city's 18th-century custom of going home for mid-afternoon dinner."

Development...

As land values increase, and people want to move into old Charleston, the push is on to renovate old buildings and put up new ones. Preservationists are often successful in their efforts within Charleston, but there are worries that the surrounding areas will be adversely affected.

One example: Ashley River Road, the state's oldest thoroughfare. Along this road are found some of the great plantations of South Carolina: Middleton Place, Magnolia Gardens, Drayton Hall. Now, according to Cohen, "More than 6,000 housing units and intensive commercial development mar eight miles of the road which a decade ago was an uninterrupted tunnel through overhanging live oaks."

Another example: the Ashley River itself. Charles Duell, president of Middleton Place Foundation, says that "no rules ... control the uses of the river, and it is bedlam out there." Damage to the shoreline of Drayton Hall (built 1742) had to be repaired at a cost of $30,000.

Displacement

One ill effect of preservation and renovation, the "gentrification" phenomenon, which in Charleston has the practical impact of moving black families out of neighborhoods as they are restored. Bad memories still linger among some former residents of the Ansonborough area, one of the first neighborhoods redone by the Historic Charleston revolving fund. "Many blacks used to live in Ansonborough," the article quotes a local community group leader, "and now very few do. Most were forced out by the rising prices."

In an effort to counteract this situation, local groups are pushing to restore their own neighborhoods--and keeping a wary eye on banks and other institutions to make sure loans are available to all residents.

Two residents of the black community who are notable in the restoration effort are Phillip Simmons and his grandson, Ajani Offuniyin. Simmons, 74, is a master ironworker, one of the few craftsmen capable of turning out the decorative grillwork which is so characteristic of Charleston's gates, fences, lanterns and railings. He is now teaching the craft to Offuniyin. Both men are active in shaping the strategy of the city's preservation movement.

Conclusion

There are problems associated with historical preservation, as the article points out. Still, there are worse fates than being historically important, aesthetically pleasing, and undeniably charming.

Note: The article on Charleston is found in the January/February issue of Historic Preservation *magazine. Members who are interested can get a photocopy of the piece from the House Research Office.*

Tort Reform: Battleground

Background

Tort reform (or "tort deform" as some prefer) is intimately linked with recent debates over liability insurance, especially cases involving medical malpractice, product liability, or sovereign immunity. They key to the debate is this: is there a need to change South Carolina law on lawsuits involving harm, negligence, and damages?

Is our current tort claim system unfair and unworkable because it encourages persons to file suits and juries to grant huge awards? Or is it a generally equitable and certainly necessary system which insures justice for the poor as well as the rich?

Baldly stated, these seem to be the two main positions on tort reform: Those who want changes, such as insurance companies and many of their clients, say the present system of lawsuits for damages is a huge ripoff. Those who resist the changes, such as trial lawyers and consumer rights groups, say the present system merely protects the rights of injured individuals, and that high insurance rates are caused by corporate greed, not high jury awards.

Last week *Legislative Update* presented the general background of the tort reform issue. In this research report, we present in more depth and detail the contrasting views of the opposing sides. This report focuses on the approximately half a dozen issues which seem to be at the heart of the liability insurance/tort reform controversy: the size of jury awards for damages; limits or caps on non-economic ("pain and suffering") damages; lawyer contingency fees; the elimination of collateral source, or "double collection;" and the possible effects of enacting tort reform legislation, especially in the area of liability insurance.

As is always the case, *Legislative Update* favors neither side, and is interested only in shedding some light on this question.

High jury awards: are they the culprit?

One argument often advanced to support changes in our legal system of tort suits is that juries frequently and capriciously award excessively large amounts to plaintiffs in liability cases.

Horror stories abound about huge awards for minor injuries. For instance, there's the one about the vandal who was climbing on the roof of a high school gym and fell through a skylight; he sought and won damages in six figures. More to home, there was the woman in Greenville who sued a hospital for letting a gum ball tree grow near a parking lot; she slipped on a gum ball, sued, and received a verdict of $75,000.

There are three questions that need to be answered here: 1) are these large awards frequent? 2) how large are these awards? 3) are they justified?

The frequency of such enormous awards seems doubtful; after all, if they were really common, they'd no longer be headline news. Studies by the University of Wisconsin (in its Civil Litigation Research Project) seem to indicate that large awards are far and few between. The project studied 1,600 tort claim cases; most of them (over 50%) dealt with disputes that involved less than $10,000. Only twelve percent involved claims of more than $50,000.

The number of million dollars awards might be used as a rough but fairly accurate gauge of whether large monetary settlements are being made by the courts. According to a study in *Business Week* magazine (April 21, 1986), during the past fourteen years there have been 1,642 awards of $1 million or more.

There is the argument that more and more tort cases are being brought in this country--in the words of some, that we are experiencing a "litigation explosion." A study by the National Center for State Courts looked at the number of tort cases filed since 1978 for a group of thirteen states; the states were selected because they provided the information already divided into categories, such as "tort cases." According to NCSC, there was a 2% increase in tort filings between 1978 and 1981, and a 7% increase from 1981 to 1984. Overall filings went up by 9%. During the same time, population in the studied states increased by 8%.

What about those cases that do go to court? Another factor affecting frequency of high awards: most tort claims cases never get to the jury at all. According to the same Wisconsin study, "more than 90 percent of disputes are resolved without litigation, and 90 percent of those cases that are the subject of lawsuits are settled before verdict."* Another study puts the number of lawsuits settled prior to going to court at 75%.

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*The Wisconsin study is frequently cited in press releases and information distributed by the Association of Trial Lawyers of America, who are definitely opposed to tort reform. While the figures appear to be accurate, caveat lector.

In dealing with jury awards, we need to remember that the jury system is a long-established right in British and American law. Supporters say that the jury acts as the "conscience of the community," rendering judgements that reflect the moral consensus of society. By this light, high damage awards are justified, because they are what we, as a community, would award. On the other hand, there is no doubt that juries can be swayed by emotional appeals; remember the old saw: If innocent, choose a trial by judge; if guilty, a trial by jury.

However, despite this aspect of jury trials, it still remains that the plaintiff in a tort case bears the burden of proof. He or she must not only present reasonable evidence of injury, but must also have proof that the defendant was legally responsible for the injury--that the action or inaction of the defendant was the cause of an injury that caused damage to the victim.

The size of jury awards is another point to consider. There is this outfit in Solon, Ohio called Jury Verdict Research, Inc.--known as JVR to its friends in the insurance and legal fields--which keeps count on these awards. According to JVR in 1984 the average liability award in a defective or dangerous product case was $1.07 million; the average medical malpractice award was $950,000. These figures certainly seem to suggest large amounts of dollars are being handed out by juries.

However, JVR's figures need to be adjusted. First, they count only cases where the plaintiff wins. Suits won by the defendant are not included in the total--and in such cases, no monetary awards are made. If all tort claims cases were fed into the calculations, the average amount would therefore drop.

How much would it drop? According to JVR, less than half of the cases tried by juries are decided in favor of the plaintiff.

A similar study by the Rand Corporation says that the average compensation per lawsuit in 1985 was in the range of $22,000 to $27,000; total cost of tort litigation in 1985 was set at between $28 to $35 billion. "This includes all compensation, fees, claims processing and value of litigants' time."*

Supporters of the present tort system say that it should also be remembered that the jury's decision is only one step in the judicial process. The defendant's lawyers have several options, from asking the court to set aside the verdict to filing an appeal. In the case of the Greenville woman injured by an errant gum ball, for example,

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*According to James Kakalik, who so testified before a Subcommittee on Trade, Productivity, and Economic Growth of the Joint Economic Committee of the Congress in July, 1986.

a circuit judge threw out the judgment, saying he could not "comprehend how it can be negligent to have a tree on a business premises from which sweetgum balls fall on the ground." Apparently it is not uncommon for jury awards to be reduced in the appeals process.

At least, that is what the Association of Trial Lawyers of America would have us believe. According to them, of the 198 cases in 1984 and 1985 that brought initial verdicts of $1 million, the average final settlement ranged from 24 to 40% of that, and the average tort case settled for 26% of the original verdict.

Still, those who believe that the system needs reforming could point to these figures as well, using them as proof of excessive awards. After all, 40% of $1 million is $400,000; and even when a case is settled for 26% of such an original verdict, we're still talking over a quarter of a million dollars.

Finally, the question that is perhaps most important: are these large damage awards justified? Such a decision depends both upon the extent of injury and the fault of the defendant, but the damage to the plaintiff seems to be the deciding factor. To quote JVR once again: "While an award of one million dollars or more may appear unreasonable at first glance, these are generally made to seriously injured plaintiffs and the jury's decision to grant such a verdict is usually based upon testimony presenting legitimate computations of the plaintiff's projected lost earnings and the medical expenses necessary to sustain him for life."

True enough, supporters of tort reform might agree--but what about those cases where clearly the injury was minor and the fault debatable? Shouldn't something be done to tighten up the system to prevent those inequities? That, of course, is one question which research can't answer.

Caps on non-economic damages--"pain and suffering"

One of the most frequently advanced items for tort reform is putting a ceiling, or "cap" on the amount of money that can be awarded for non-economic damages (generally known as "pain and suffering.")

In essence, there are two types of loss a person might sustain as a result of injury. "Economic damages" are those which can be calculated on the basis of the tangible costs to the person, such as medical expenses, or income that cannot be earned because of the condition the person is left in. "Non-economic" damages include pain and suffering, which often embrace mental or emotional problems, and what is known as loss of companionship, or loss of consortium--the value to a spouse or children of the injured persons' love, help and companionship.

Obviously, non-economic damages cannot be calculated with the same precision as economic damages. We might figure out how much a person might have earned during an average career had he or she not been incapacitated; how can you put a price on the loss felt by the injured person or the family?

You can't, say supporters of tort reform, and you can't trust juries to do so. Easily swayed by emotional appeals or extraneous considerations, they might be led to award excessive amounts. Far better to put a ceiling on the amount that can be awarded, thus giving some rationality and consistency to the distribution of damages.

You can't put a price on the loss, defenders of the present system might also say—but then add: can any award really be too large? If the facts of the case convince a jury that a person has truly suffered catastrophic injury, then the amount awarded should be suitable to the situation.

Punitive damages: how much and to whom?

Punitive damages are, as the name indicates, intended to punish. In tort cases the punishment is meted out to individuals, business corporations or others who have injured another through willful or reckless actions or omissions—in other words, the defendant should have known better, should have acted differently, but didn't, thus causing the situation which led to the injury which resulted in the damage to the plaintiff.

In such a situation, according to present law, the party responsible can be ordered to pay first for the economic damages caused, then also for non-economic damages, and finally punitive damages—to punish for the past actions and to deter future ones.

According to some observers, this triple threat is not only excessive, but costly to us all in the form of higher insurance policies, increased court costs, and higher product prices. Critics of the present tort system say that punitive damages should be awarded only in a certain limited number of cases—cases where the defendant is found guilty of truly reckless or malicious actions. However, they maintain, plaintiffs request punitive damages as a matter of course, and juries tend to award them based on the presumed ability of a defendant to pay. Thus, a large corporation might be assessed high punitive damages regardless of its actual liability for an incident. (This is a variant of the "deep pockets" theory of litigation: when suing for damages, sue the party that has the most money.)

Three possible changes could be made in punitive damages: 1) drop them altogether; 2) set a cap on them; 3) have them paid to the state, rather than the plaintiff. A combination of 2) and 3) is also possible.

Those who defend the current set-up argue that punitive damages are rarely awarded; that they are not excessively high; and that when punitive damages are handed out, they are well-deserved.

Punitive damages seem most likely in cases involving product liability (a company knew a product was potentially dangerous but decided to risk it rather than go for expensive re-design and production); medical malpractice (incompetence of doctors being something which should be both punished and discouraged); and what is termed "bad faith" (intentional harm being the prime reason punitive damages were instituted).

How often are punitive damages given out? Supporters of tort reform, most notably the insurance industry, say frequently--and excessively. Defenders, trial lawyers and consumer advocacy groups, say rarely--and deservedly. Who's right? Figures are difficult to come by, but lawyer Stephen Daniels claims that punitive damages are given in only ten percent of cases, and that the median amounts range from $100,000 in New York City to $8,800 in Chicago.

The arguments for dropping, capping or sending punitive damages to the state--rather than the plaintiff--are basically the same: these actions would remove the temptation to take people to court and hope for large punitive damage awards. Removing this temptation, some say, would reduce the number of liability lawsuits being filed, and this in turn would ease the liability insurance problems.

However, opponents of this view could make the following rejoiners: the frequency and size of punitive awards do not seem sufficient to entice people into court; punitive awards can be made only <u>after</u> actual harm--that is, economic damages--have been proven, so punitive damages are at best a <u>secondary</u> matter; it is difficult to prove the conditions needed to award punitive damages, and when they are awarded they are probably deserved.

As to capping the awards or sending them to the state treasury, the arguments might be much the same. Supporters of tort reform could claim that the guilty defendants would still be punished and deterred from future harmful actions, but plaintiffs would not reap windfall profits. And funds diverted to the state could be used for the general benefit--such as cleaning up hazardous waste sites.

Against this line of reasoning could be said the following: when a tort case is resolved in favor of the plaintiff, the remedies imposed by the court are supposed to compensate that person for the injuries he or she has suffered. Any awards must be comparable to the damage inflicted, and punitive awards are merely additional--but justifiable--compensation. Setting a cap on them or diverting them from the injured party would be inflexible, unrealistic, and morally wrong.

Joint and several liability: sharing the blame

The doctrine of joint and several liability comes into effect when more than one person or company is responsible for causing harm. According to joint and several liability, each wrongdoer is accountable for the damage caused, and the fact that others were involved in no way lessens the individual guilt, nor reduces the amount of damages which can be collected.

Wait a minute! cry proponents of tort reform. You mean if A, B and C are responsible for D's injury, then D can go after them together and individually? You mean if A has a lot of money, and B and C are virtually bankrupt, then D can collect damages from A, even if B and C can't pay anything? That's hardly fair, is it?

It's fair from D's point of view, say defenders of the system. After all, tort cases are intended to remedy (as much as possible) the harm done to the victim. If D proves his case in court, then he is entitled to full compensation for his injuries; let A, B and C sort out among themselves their shares of the payment.

There are really only two sides to this particular issue of joint and several liability: 1) blame should be spread among defendant's proportionally; 2) the existing doctrine should be maintained.

Those who want the change make these points in their arguments: First, it is only fair that defendants be accountable for the amount of injury they caused individually. Why should a company which dumps one barrel at a hazardous waste site be equally liable as the company which dumps one thousand barrels? Second, the doctrine ignores cause and effect: the major culprit in any injury may not be the most recent party involved. Third, the present system encourages plaintiffs to go after defendants with "deep pockets"—those most able to pay damages—regardless of actual responsibility.

Those who wish to continue under the doctrine of joint and several liability counter with these arguments: First, there are presently safeguards to prevent abuses of the doctrine. Defendants are liable only if they are substantial contributors to the injury, and if the injury is indivisible. Second, if the law is changed to a proportional system, victims would find it difficult, if not impossible, to establish precisely the share of injury caused by each particular defendant. Third, some defendants could hide behind others—companies could blame their consultants; consultants could point to contractors; contractors might say workers were to blame. Fourth, if a change were made making blame proportionate, the victim might find it impossible to receive full compensation—as, for example, if the "chief culprit" went bankrupt. If one wrongdoer is unable to pay his share it is better that other wrongdoers absorb the cost rather than have the victim absorb the cost.

Lawyer's contingency fees: serving justice or greed?

The contingency fee is a method to pay the plaintiff's lawyer in a tort case. Since the person bringing the suit seldom has the money to pay a lawyer upfront for hourly rates, the lawyer agrees to work for a percentage of the settlement or trial award—if the suit is successful. If the plaintiff wins, the lawyer gets paid; the larger the award, the larger the lawyer's payment. If the plaintiff loses, the lawyer gets nothing, and must bear the expenses of preparing the case.

Critics of contingency fees say they encourage a gambling sort of attitude among lawyers and clients. Hoping to cash in on a huge award, lawyers encourage people to file liability cases, anticipating a cut of between one-third to one-half of the final award. Critics further say that the nature of the contingency fee entices the plaintiff's lawyers to seek the largest possible award, regardless of what would be appropriate to the actual injury.

Supporters of the contingency fee setup say that it is vital to our judicial system, and that it actually reduces the number of improper or "frivolous" cases filed. Without contingency fees, they point out, people would be unable to afford a lawyer to pursue a case of negligence, defective products, or unsafe conditions. A large company (or its insurance carrier) can afford to pay defense lawyers by the hour; an injured plaintiff simply cannot. This line of reasoning sees the contingency fee system as "the key to the courthouse" for the average person.

The allegation that contingency fees encourage lawyers and their clients to gamble on the "liability lottery" is also disputed by some. The fee, they point out, is contingent—it will be paid only upon a victory by the plaintiff. What lawyer would risk taking on a dubious or unworthy case which has little chance of being won? Making payment upon victory actually cuts down on so-called frivolous cases, because lawyers weed out those claims they think have little hope of winning. To suggest that lawyers egg on clients to sue because of the contingency fee system is to accuse the legal profession of "ambulance chasing."

Do contingency fees prompt lawyers to seek higher than reasonable damage awards? Critics of the system say yes—the higher the award, the higher the lawyer's share. Supporters say no—certainly a lawyer will seek the best settlement for his or her client, but the size of an award is more likely to be dependent upon the severity of injury to the plaintiff. This point of view is supported—in a back-handed fashion—by Vincent Maressa, executive director of the New Jersey state medical society. Maressa, quoted in *Medical Economics* (October 21, 1985) says of the contingency fee system: "It means that the amount an attorney gets paid doesn't depend on his skill or performance, but on how badly injured his client is."

Maressa's comments, however, raise another reason to cap contingency fees: so more money can go to the plaintiff—the injured person. Some studies show that this is not likely to reduce the number of cases filed. The St. Paul Insurance Company looked at the frequency of claims per 100 policyholders in several states over a ten-year period; some states had contingency fee caps, others did not. According to the *Medical Economics* report, the study "found no discernible pattern in those [state] that cap fees or those that don't."

And what would a contingency fee cap look like? California's might serve as an example; it was recently held to be constitutional by the US Supreme Court (November, 1985). Under that law, a lawyer's fees are limited to 40% of the first $50,000 awarded; one-third of the next $100,000; and 10% of anything over $200,000. Another example, Florida, where a sliding scale determines the take, ranging from 15% if a settlement is reached, to 45% if the case winds it way throughout the entire trail of trial and appeal.

Collateral source: "double collection?"

When a jury debates the size of an award for a plaintiff, it is not allowed to hear evidence of compensation the plaintiff might be receiving from other sources. This is the collateral source rule. It is possible that a plaintiff may receive compensation from several sources. This, say some, is unfair.

Proposed changes would be: 1) Eliminate the collateral source rule, allowing consideration of all sources of damage payment. Damage awards could be set according to the full range of circumstances. 2) Relax the rule, perhaps at the discretion of the trial judge, to allow evidence to be presented on compensation received by the plaintiff. 3) Require a mandatory offset for collateral sources. This means that if a person is receiving one damage award, any future awards would reduce the amount of the first award.

On the other hand, supporters of the collateral source rule might maintain that the system is structured to serve the interests of the injured plaintiff. If a person can prove wrongdoing on the part of one defendant or several defendants, payment should be made. It does not reduce the plaintiff's damages because more than one person or company is responsible, and it should not reduce their liability because others share responsibility for the injury. In this respect, the collateral source rule appears quite similar to the doctrine of joint and several liability.

Effects of tort reform: lower insurance rates, or fairness in court?

Supporters of tort reform can make many arguments for the changes they propose, but perhaps their most forceful is this: the

present system encourages suits, which keep liability insurance rates high, and insurance itself hard to get. Does it follow then—as they seem to imply—that tort reform will lead to lower liability insurance rates?

That claim is not made by most supporters of tort reform. The changes they seek are to make the system fairer and more equitable; to eliminate inducements to unnecessary lawsuits; and to halt the spread of the "litigation explosion." In other words, they want to correct an aspect of the legal system which has gotten out of kilter.

The relationship of most tort reform proposals to insurance rates seems problematical in most cases. In a nearby state where tort reforms have been enacted, the changes don't seem to have reduced rates at all.

Florida enacted tort/insurance reform legislation in 1986. The bill had a collateral source offset provision; changes in joint and several liability; limit of noneconomic damages to $450,000; restriction in punitive damages; and a provision that future economic damages over $250,000 be paid at present value. The law also required insurers to provide information on the effect the law had on their premiums.

According to papers filed by Aetna, the changes would make no reduction in its products/bodily injury insurance costs. In general liability the company estimated that the collateral source offset would reduce costs by 0.4%. The St. Paul Fire and Marine Insurance Company also provided estimates of what the tort law changes would do to insurance costs (concentrated on medical malpractice, it should be noted; St. Paul is one of the largest medical insurers in the country). The bottom line was generally the same as Aetna's: no reductions. Its conclusion read:

> The tort law changes effective July 1, 1986 in Florida will, hopefully, have a positive impact on loss costs for occurrences after that date. However, to forecast the effect is highly speculative. Our evaluation of prior losses showed little or no savings under key provisions of the law and our analysis of other provisions show no expected savings. Our best estimate is no effect from the tort changes.
>
> It can be hoped that the adoption of these tort changes will have an intangible effect on society, and further work to mitigate future loss trends. However, the trends in medical malpractice have been very high. The effect of the reform needs to be very strong to stem such trends.

Conclusion

It should be noted that most supporters of tort reforms have not linked them to a direct decrease in insurance rates. They have made the point that while changing the tort system may not reduce costs, leaving it as it is will surely lead to increased costs. That argument, and the ones about the essential unfairness of the present legal tangle, represent the core of their argument.

Those who want the present system to remain pretty much intact say claims of too many cases, excessively high awards and too high lawyer fees obscure the basic issue: the right of injured persons to seek redress through our legal system, especially through trial by jury, and be properly compensated for their damages.

The debate between these two points of view involves many considerations: legal, financial, ethical, even philosophical. "Tort reform," in all its manifestations and ramifications could be one of the thornier issues to confront this session of the South Carolina General Assembly.

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